Rules and Standards in the Workplace

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A Perspective from the Field of Labour Law

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RULES AND STANDARDS IN THE WORKPLACE: A PERSPECTIVE FROM THE FIELD OF LABOUR LAW

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Abstract: Employment rights may be crafted as 'bright-line' rules or open-textured standards. Labour law scholarship has principally engaged with the significance of employment rights which are articulated as rules and whether it is preferable for such rules to be ascribed mandatory or default status. However, employment rights which are framed at a higher level of generality such as standards have not been examined in the same level of detail. Standards can be distinguished from rules by reference to the degree of precision and transparency of the employment right and can be divided into standards of conduct and standards of review. Standards of conduct direct commands to decision-makers such as employers whereas standards of review are addressed to adjudicators whose function it is to scrutinise the conduct of decision-makers. In the majority of cases, the intensity of scrutiny of decision-makers which is attached to both of these standards is the same, thus resulting in the conflation of the standards. However, on occasion, the level of scrutiny exerted by the adjudicator pursuant to the standard of review may be more, or less, acute than that attached to the standard of conduct. This article examines the rationales for such divergence and analyses what the degree of intensity of scrutiny attached to standards of conduct and standards of review reveals about employment rights. The paper finally erects a framework against which the argument about varying intensities of scrutiny can be given greater clarity and meaning by advancing a series of alternative possible ranges or spectra of standards of conduct and review.

Keywords: labour law, employment law, employment rights, labour rights, rules, standards, standards of conduct, standards of review, intensities of scrutiny

Rules and Standards in the Workplace: A Perspective from the Field of Labour Law

1. Introduction

A current dilemma which is debated in the field of jurisprudence concerns the nature and structure of legal commands and whether they in fact form part of the 'law' in a legal positivistic sense. Of particular interest is how this debate plays out in the context of particular areas of the law. This article seeks to supplement and enrich that more general debate by examining the nature and structure of legal commands which confer employment rights in the field of labour law. To that extent, it is engaged in a descriptive exposition of, and normative discourse about, the nature and structure of labour laws. In pursuing this line of enquiry, the paper adopts a basic distinction between employment rights which are expressed as rules and those which are articulated as standards. Existing labour law scholarship has principally engaged with the significance of legal commands conferring employment rights which are articulated as rules. For example, theoretical enquiries have investigated the means by which the mandatory or permissive status of an employment right (which is crafted as a rule) might inform our understanding of the level of significance of that right in policy and normative terms.[1] However, this paper marches along an altogether different path, seeking to plug a gap in the existing labour law literature by focusing on employment rights which are crafted as open-textured legal standards. An employment right which is articulated as a standard may be described as a juridical command to

[1] Hepple, B., *Rights at Work: Global, European and British Perspectives* (London, Thomson/Sweet & Maxwell, 2005) at pp. 53-63; S. Deakin and F. Wilkinson, 'Labour Law and Economic Theory: A Reappraisal' in H. Collins, P. Davies and R. Rideout (editors), *Legal Regulation of the Employment Relation* (Kluwer, London, 2000) 29 at 33; H. Collins, 'Legal Responses to the Standard Form Contract of Employment' (2007) 36 *ILJ* 2, 7-10.

an employer which draws out the law's expectations about acceptable managerial behaviour at a high level of generality.

In examining standards, a distinction is made in this paper between standards of conduct and standards of review. Standards of conduct are directed at employers and delineate the nature of the behaviour which the law anticipates from employers, whilst standards of review represent the level of scrutiny of managerial decision-making which the law expects from adjudicators and so are addressed to such enforcement authorities. The analysis in this paper is conducted from a functionalist perspective,[2] that is to say a normative philosophy which postulates that one ought to seek to understand, and analyse labour law, from an external prism through the goals and objectives which it is designed to serve. Applying such a perspective, the principal thesis is that the intensity of review which is attached to an employment right expressed as a standard tells us something about the strength of particular policy preferences or the fundamental values underpinning that particular right and the right itself: the greater the deference to management allocated to the standard, the less significance the law would appear to attach to that right and the inherent policy issues or fundamental values which inform its scope and substance. Once this has been understood, it is an insight which affords us another yardstick against which employment rights can be measured. A normative structure is erected against which such an argument can be given greater clarity and meaning. The paper seeks to achieve this by elaborating a series of alternative possible ranges or spectra of standards of conduct.

[2] For a taxonomy of functionalist techniques in legal scholarship, i.e. legal scholarship which seeks to illuminate legal rules, standards or areas of law by reference to external perspectives, see C. McCrudden, 'Legal Research and the Social Sciences' (2006) 122 *LQR* 632, 636-641; For the hallmarks of functionalism, see E. Weinrib, *The Idea of Private Law* (Cambridge, Massachusetts, Harvard University Press, 1995) 6-8.

2. Of Rules and Standards

The aim of this section is fourfold. First, to say a little about the defining criteria of rules and standards in the field of labour law as a means of differentiating between the two. Secondly, to locate the analysis conducted in this paper within the general jurisprudential discussions which debate the status and nature of legal commands such as rules and standards and whether the latter form part of the law in terms of a legal positivist framework. Thirdly, to survey the academic literature which charts the taxonomy of employment rights articulated as rules and the rationales expounded for the status attached to such rules. Finally, an exploration will be conducted of the circumstances in which it may be more appropriate to draw an employment right in terms of a standard rather than a rule. The lines of thought which emerge from the discussion in this section will be carried forward to the remainder of this paper in different ways. To enable us to make progress towards these three objectives, it is sensible first to say something about the objectives of labour law itself.

It is trite to state that one of the key functions of labour law is to strike a balance between management and the labour force, or 'to support and to restrain the power of management and the power of organised labour'.[3] At the heart of the employment relationship lies the managerial prerogative. A consequence of the exercise of managerial autonomy is that the employer will take a whole range of decisions having positive and adverse implications for employees and their interests. Given the potential for abuse arising from the untrammelled application of the managerial prerogative, the common law and Parliament have intervened in specific contexts and at different times to introduce laws to police the behaviour of employers by conferring rights in

[3] P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law*, (Stevens & Sons, London, 1983) ("*Kahn-Freund's Labour and the Law*") at p. 15.

favour of employees. Such laws establishing employment rights may manifest themselves as (i) rules or (ii) standards.[4] Rules occasionally impose strict liability on employers. Regulation 13(1) of the Working Time Regulations 1998[5] represents a perfect example of an employment right expressed as a basic rule, to the effect that all employees are entitled to four weeks leave in each leave year. On the other hand, a juridical command which confers rights in favour of employees may be channelled through a standard which signposts expectations about managerial behaviour in an open-textured manner. Standards represent a less peremptory or compelling form of normativity. For example, a possible variation on the theme of Regulation 13(1) of the Working Time Regulations 1998 duly expressed in terms of a standard might be a legal command that all employers must ensure that their employees take an adequate and appropriate amount of leave in any successive annual period. The legal command expressed as a standard is thus less precise in nature in comparison with the rule amounting to a tangible differential in formal substantive terms.

Staying on the theme of the underlying criteria which distinguish rules from standards, Diver has forged a distinction between rules and standards in terms of the degree of transparency and accessibility of the legal command.[6] In relation to the criteria of 'transparency', whether a legal command may be conceptualised as a rule or standard depends on the manner and degree of its articulation. The degree of precision is important since the more precise the command, the more likely that it is transparent and so the more persuasive the argument becomes that the command ought to be classified as a rule. The more open-ended the command, the greater the force in the

[4] H. L. A. Hart, *The Concept of Law* (2nd edition, Oxford: Clarendon Press, 1994) 131-134; R. Posner, *Economic Analysis of Law*, (7th edn, New York: Aspen, 2007) 587-590.
[5] SI 1998/1833.
[6] C. S. Diver, 'The Optimal Precision of Administrative Rules' 93 Yale L.J. 65, 67 (1983); L. Kaplow, "Rules Versus Standards: An Economic Analysis" 42 Duke Law Journal 557, 561.

contention that it is a standard. Moreover, the more 'accessible' the legal command, i.e. the more obvious it is to its intended audience that the command is directed to concrete situations without particular difficulty or effort, the more likely it will be a rule. Classic standard-like language are words such as 'reasonable', 'proportionate', 'rational', 'equitable', 'adequate' and 'appropriate'.

It is also crucial not to lose sight of the fact that legal commands can be measured along a spectrum comprising of 'standard-like' generality at one end of the continuum and 'rule-like' complete precision at the other.[7] Thus, it is illogical to think of two distinct and discrete pockets of 'rules' and 'standards'. The categories are not mutually exclusive. Instead, the journey from rules to standards and vice versa may be negotiated in a smooth movement along a single plane, rather than in a jagged progression or 'jump' from one distinct area to another. Furthermore, the impact of a legal command is also critical, since a command which ostensibly appears to have been formulated as a standard may nevertheless have attained a well-recognised meaning of its own at popular or judicial level. In such a situation, the clarity of the outcome of application will effectively mean that the command is more rule-like than standard-like.[8] Moreover, over time, concentrated adjudication may convert a standard into a rule. As an adjudicator teases out the parameters of the factual circumstances in which a standard will be deemed to have been engaged or breached, the doctrine of precedent will operate to concretize judicial guidance.[9] This will transform the standard into a rule on an incremental and casuistic basis.

In normative legal discourses which are concerned with the general nature of law itself, the debate about rules versus standards is one which takes place at a macro level of generality in

[7] I. Ehrlich and R. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD, 257, 257-258 (1974).
[8] C. S. Diver, 'The Optimal Precision of Administrative Rules' 93 Yale L.J. 65, 69 (1983).
[9] N. Duxbury, *The Nature and Authority of Precedent*, (Cambridge, CUP, 2008) 23.

quasi-theological terms, e.g. whether a standard is in fact law or whether law is restricted to a series of rules in the exclusive positivistic sense.[10] Whilst recognising the fundamental importance of that particular jurisprudential debate, the analysis pursued in this article is expressed at the meso level rather than macro level. It is conducted on a different plane and thus moves along in a parallel direction towards an assessment of the nature and function of the laws promulgated in the field of labour law. The purpose of making the categorical distinction between rules and standards in this paper is essentially geared towards the adoption of an organising framework. This framework enables one to move on to a consideration of the issues which influence the nature of standards and the identification and rationalisation of the elements which shape the level of intensity of scrutiny of managerial action duly exerted by an adjudicator pursuant to the application of such standards.

But in advance of moving on to a detailed exposition of standards, it is worthwhile to pause for a moment and to reflect a little on the nature of rules. It is trite to postulate that rules may be mandatory or permissive/default in nature.[11] Mandatory rules are unyielding to other legal rules or terms and conditions agreed by the parties.[12] Meanwhile, default rules, by definition, are susceptible to disapplication, modification or limitation, i.e. they constitute legal norms of *ius dispositivum*,[13] which may render them ineffective. Corporate law scholarship has developed a sophisticated normative framework which examines the circumstances in which it is desirable that

[10] For example, in the sense of the debate between Dworkin and legal positivists about the legal status and nature of what are termed 'principles'.
[11] A further category is an 'enabling' rule, i.e., an 'opt-in' rule.
[12] In the sense described by K. Llewellyn, 'What Price Contract? – An Essay in Perspective' 40 *Yale Law Journal* (1930) 704 at 729-730.
[13] See O. Kahn-Freund, 'The Shifting Frontiers of the Law: Law and Custom in Labour Relations' (1969) 22 Current Legal Problems 1 at p. 2, B. Rudden, 'Ius Cogens, Ius Dispositivum' (1980) 11 *Cambrian Law Review* 87 at 89-90 and in particular the discussion in M. Freedland, 'Ius Cogens, Ius Dispositivum, and the Law of Personal Work Contracts' in P. Birks and A. Pretto (editors), *Themes in Comparative Law*, (OUP, Oxford, 2002) 165.

a rule be mandatory or default in nature.[14] Likewise, in the context of labour law, there are various rationales why a rule may be framed in a mandatory or permissive fashion and what the selection of mandatory status tells us about the employment right from an economic and normative perspective. Mandatory, i.e. inderogable rules, are sometimes perfunctorily expressed to be a more effective method of dealing with the specific attributes of a particular class of contract such as employment. Scholars versed in the economic analysis of law point to the efficiency arguments which are associated with inderogable rules. For example, the notion of self-paternalism[15] is often cited as a reason for mandatory rules or rights, in the sense that in the absence of a mandatory rule, the aggregate transaction costs over a series of transactions in a particular context would be so high as to justify the imposition of mandatory status to the rule. Another oft-quoted rationale for the promulgation of mandatory rules is that they are justified where it is clear that permitting contracting parties to craft express terms which oust the mandatory rule would result in significant costs to third parties, i.e. economic externalities which are inefficient.[16] However, scholars such as Collins have challenged the view that the deployment of mandatory rules are necessarily efficient. As a means of meeting regulatory targets, mandatory rules are generally the 'least expensive and least effective' of the plethora of regulatory methods open to legislators in the field of labour law, since the legislature is open to the charge that it 'has not pursued a rigorous assessment of how to improve efficacy at the least cost'.[17]

[14] B. Cheffins, *Company Law: Theory, Structure and Operation* (Oxford, OUP, 1997) 218-221; M. Eisenberg, 'The Structure of Corporation Law' 89 *Columbia Law Review* 1461 (1989).
[15] I. Ayres, and R. Gartner, 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules' 99 *Yale Law Journal* (1990) 87 at 88; G. Calabresi and A. D. Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' *Harvard Law Review* 85 1089 at 1113; J. Kleinig, *Paternalism* (Manchester, Manchester University Press, 1983) at pages 197 - 198.
[16] B. Cheffins, *Company Law: Theory, Structure and Operation* (Oxford, OUP, 1997) 244-247.
[17] H. Collins, 'Justifications and Techniques of Legal Regulation of the Employment Relation', in H. Collins, P. Davies and R. Rideout (editors), *Legal Regulation of the Employment Relation* (Kluwer, London, 2000) at page 19.

Meanwhile, from a normative perspective, both labour law and corporate law scholarship[18] have sought to identify the insights which immutability can reveal about particular employment rights. Mandatory status may be desirable where important policy goals or fundamental values are at stake. For example, an immutable rule to the effect that no employee should be required to work in excess of forty-eight hours in any weekly period may reflect the expression of a policy preference or certain fundamental values: a policy choice in the sense that it is a collective goal of the community to secure the offsetting of the social, productivity and public welfare costs associated with an excessive working hours culture or a reflection of fundamental values in terms of a recognition that a reasonable limit on working hours is vital in order to protect the dignity, respect and sense of well-being of employees as a matter of principle. The distinction here between policy preferences and fundamental values is reflective of the Dworkinian distinction between policy considerations as 'collective goals' of the community and fundamental values in the sense of precepts which operate to organise and explain subsets of principles and other legal materials more generally such as rules, norms, standards, etc..[19] Rudden and Freedland[20] have provided further substance to the underlying argument that rules may be crafted in mandatory terms as a means of realising policy preferences, i.e. the pursuit of collective objectives pursuant to a particular employment right:

[18] Hepple, B., *Rights at Work: Global, European and British Perspectives* (London, Thomson/Sweet & Maxwell, 2005) at pp. 53-63; M. Freedland, 'Ius Cogens, Ius Dispositivum, and the Law of Personal Work Contracts' in P. Birks and A. Pretto (eds), *Themes in Comparative Law* (OUP Oxford 2002) 165, 170-171; B. Cheffins, *Company Law: Theory, Structure and Operation* (Oxford, OUP, 1997) 247-249.

[19] R. Dworkin, *Taking Rights Seriously* (Duckworth, London, 1977) 90; N. MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, (Oxford, OUP, 2005) 192-193.

[20] See B. Rudden, 'Ius Cogens, Ius Dispositivum' (1980) 11 *Cambrian Law Review* 87 at 89-90 and M. Freedland, 'Ius Cogens, Ius Dispositivum, and the Law of Personal Work Contracts' in P. Birks and A. Pretto (editors), *Themes in Comparative Law*, (OUP, Oxford, 2002) Chapter 12 at page 165.

> … the notion of over-riding public policy… is very helpful in understanding the way in which the distinction between derogable and inderogable law is in fact drawn… [and] a broad notion of public policy and its bearing upon private contracting will help us to draw those many threads together.[21]

The above is not to say that Rudden and Freedland's argument posits that all inderogable rules have notions of public policy as their underlying rationale. Instead, they rightly point out that the reason a number of employment rights are articulated in inderogable terms is predicated upon public policy issues.

Normative frameworks have also been constructed by scholars in an attempt to determine whether a rule should be chosen over a standard (and vice versa) in promulgating a legal command. Again, the economic analysis school has penetrated this line of thought. From an efficiency perspective, whether a rule or a standard is selected is essentially a decision regarding the extent to which it is appropriate that 'a legal command should be resolved in advance or left to an enforcement authority to consider [at a later date in case-specific contexts].'[22] The investigative and research costs associated with the promulgation of employment rights as precise and specific rules may outweigh the relative benefits. In such circumstances, it may be more efficient and less costly for a rulemaker to frame the employment right in terms of an open-ended standard and defer the evaluation of liability to an adjudicator in particular cases which emerge in the future. A standard affords a law-maker the luxury of avoiding the upfront expenditure of resources by devolving responsibility for dispute resolution to adjudicators to ascertain whether

[21] M. Freedland, 'Ius Cogens, Ius Dispositivum, and the Law of Personal Work Contracts' in P. Birks and A. Pretto (editors), *Themes in Comparative Law*, (OUP, Oxford, 2002) 165 at 170-171.
[22] L. Kaplow, "Rules Versus Standards: An Economic Analysis" 42 Duke Law Journal 557, 562. Writer's annotations in square brackets.

an employer has infringed the standard or not as the case may be.[23] This point is amplified where the frequency of recourse to the employment right is low or likely to be low.[24] By its very nature, a rule tends to be over-inclusive or under-inclusive and so might easily fail in its primary task of resolving each of the possible circumstances which it may have been designed to handle.[25] A related point is that law-makers inevitably labour under the burden of limited foresight in the sense that they are naturally unable to conceive in advance of every circumstance in which a particular rule may be applicable. Given the existence of such encumbrances, it may be more efficient to draw the employment right in terms of a general command directed at employers. A further argument from the economic analysis school is that the extent and frequency to which a right may be disapplied (in the sense that it is permissive) also influences the nature of the legal command. The argument runs that where it is more likely than not that an employment right will be displaced by consensus, the more credible the argument becomes that it ought to be drawn in terms of a standard rather than a rule. If one assumes that the costs associated with framing rules are generally higher than drawing up standards, then one could argue that there is little point in a rulemaker incurring the expense of framing what amounts to an optimal rule if its impact will be minimal as a result of the high frequency of contracting out.[26] Whilst such an argument does indeed possess a degree of logic, it does labour under the shortcoming of having embedded within it two presuppositions which may not be borne out by empirical evidence. First, that rules are generally more expensive to promulgate than standards and secondly, that *ius dispositivum* rules are likely to be displaced by contracting parties. Of course, in practice, much will depend on the

[23] F. Schauer, *Profiles Probabilities and Stereotypes* (Harvard University Press, Cambridge, Massachusetts, USA, 2003) at pp 199-201.
[24] L. Kaplow, "Rules Versus Standards: An Economic Analysis" 42 Duke Law Journal 557, 621; I. Ayres, 'Preliminary Thoughts on Optimal Tailoring of Contractual Rules', 3 S. Cal. Interdisc. L. J. 1, 7 (1993-1994).
[25] I. Ehrlich and R. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD, 257, 268-270 (1974).
[26] I. Ayres, 'Preliminary Thoughts on Optimal Tailoring of Contractual Rules', 3 S. Cal. Interdisc. L. J. 1, 11-12 (1993-1994).

context and it is equally plausible that it will be more efficient on a cost-benefits analysis to apply resources towards the drafting of a default rule where it is more likely that it will not be displaced.

Legal philosophers have also investigated the jurisprudential rationales in favour of the expression of a juridical command as a rule or standard. Opinions differ, but the very least that can be stated is that some areas of life regulated by law will inevitably exhibit features whereby they will 'vary so much in socially important but unpredictable respects, that uniform rules to be applied from case to case without further official direction cannot usefully be framed by the legislature in advance.'[27] In such circumstances, a standard will be more suitable than a rule. A final rationale is political compromise. It may be impossible for a legislature to reach agreement on the detailed content of an employment right in terms of a rule. The same point applies to the judiciary who are engaged in the development of employment rights through the common law. It may be more pragmatic to articulate the employment right as a standard which can be given content and scope in the future by enforcement authorities.

Equipped with such rationales for an employment right framed as a standard over a rule, it is important to engage in a more nuanced dialogue about standards and how they may be divided into two separate camps which are mutually exclusive, yet interdependent. That is to say, that standards may be segregated into standards of conduct and standards of review. The importance of this dichotomy ought to be explored. Moreover, the distinction is particularly important since it presupposes that standards may vacillate in terms of intensities of review.

[27] H. L. A. Hart, *The Concept of Law* (2nd edition, Oxford: Clarendon Press, 1994) 131; N. MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, (Oxford, OUP, 2005) 170.

3. Of Standards of Conduct and Standards of Review

Standards may be divided into 'standards of conduct' and 'standards of review'. What is the distinction between them? To answer this question, one is required to consult existing scholarship in the area of corporate law:

> A standard of conduct states how an actor should conduct a given activity or play a given role. A standard of review states the test a court should apply when it reviews an actor's conduct to determine whether to impose liability or grant injunctive relief.[28]

In the labour law context of legal commands conferring employment rights, standards of conduct are directed at employers whereas standards of review are addressed to the tribunals and courts. Standards of conduct prescribe 'conduct rules' and guide employers on how they ought to act in a given situation. For example, in terms of a statutory provision, an employment right may be expressed as a standard of conduct to the effect that all employers must ensure that their employees take an adequate and appropriate amount of leave in any successive annual period. The actions of employers are thus guided when they are engaged in fixing the annual leave requirements of their employees by reference to an 'adequate and appropriate' standard of conduct. Meanwhile, standards of review prescribe 'decision rules' and determine how an adjudicator ought to analyse the decision or action of the employer to whom the standard of conduct was addressed.[29] Building on the above example, in the case of a dispute about the legality of the decision of an employer in allocating a period of annual leave to an employee, in the

[28] M. A. Eisenberg, "The Divergence of Standards of Conduct and Standards of Review in Corporate Law" (1993) 62 *Fordham Law Review* 437, 437.
[29] M. A. Eisenberg, "The Divergence of Standards of Conduct and Standards of Review in Corporate Law" (1993) 62 *Fordham Law Review* 437, 462.

absence of further guidance in the statutory provision, the adjudicator would be required to determine whether the period fixed by the employer met the test of 'adequa[cy] and appropriate[ness]'. In such an example, the standard of conduct and standard of review are conflated. That is to say, that the degree of scrutiny exerted by the employer over his own conduct is set at the same level as the intensity of review to be applied by the adjudicator, namely a test of what is 'adequate and appropriate'.

On the other hand, it is perfectly possible for conceptual space to exist between the standard of conduct and the standard of review. What is meant by 'conceptual space' in this context? To borrow from the aforementioned example, imagine that the above statutory provision is supplemented by a further statutory provision. The latter provision directs an adjudicator towards further particular factors, to the effect that 'in ascertaining whether the period of leave set by the employer in a successive annual period is adequate and appropriate in terms of subsection [x] above, an employment tribunal or court shall (a) have regard to the financial resources, size and administrative resources of the employer and (b) assess whether such period of leave is justifiable, having regard to the legitimate business aims and needs of the employer.' In such an example, the notion of a distinction between the standard of conduct and the standard of review assumes great practical relevance, since if the employer sought to resist liability by demonstrating to an adjudicator that the period of leave is adequate and appropriate, they would be missing the point. Although the employer is directed to consider the adequacy and appropriateness of the period which they have set, the intensity of review to be applied by the adjudicator represents a particularly diluted version of the intensity of the standard of conduct which is addressed towards the employer. The instruction to the adjudicator to take into account (i) the financial position of the employer and the (ii) justifiability of the period of leave fixed by the employer in light of the

employer's commercial interests, suggests a particularly subjective assessment, i.e. consideration of what is reasonable for the employer in the instant factual setting rather than what is reasonable according to the mores of society at large or the court or tribunal itself. In other words, that what is 'adequate and appropriate' in the circumstances is not to be analysed on an objective basis which would entitle the adjudicator to be more intrusive in their review. Instead, the standard of review points the adjudicator towards a subjective examination of the period of leave from the perspective of the employer, amounting to a more forgiving approach. This example seeks to demonstrate that the standard of conduct and standard of review may diverge.

Of course, one might argue that no such divergence in practical terms exists, i.e. that the distinction is redundant. There are a number of possible rationales for maintaining such a position. First, that since it is difficult to identify specific circumstances in which the standards of conduct and review diverge and it is simpler to provide examples where they are conflated, the distinction should be cast aside. Whilst this is true, as ever, the exceptions prove the rule and this paper will draw out compelling examples below from the field of labour law which serve to underscore the presence of the distinction. A second objection to the soundness of the distinction is related to the approach of the gatekeepers of the law, namely the legal practitioners or other professional advisers who communicate the intensity of the standards to employers. Solicitors may well opt to take the safest strategy available by advising management on the basis of the higher of the standard of conduct or standard review in terms of the level of scrutiny of managerial action. In other words, the argument runs that the manner in which the intensities of scrutiny of the standards of conduct and review are communicated renders the distinction between the two as meaningless in theory and practice. However, it is submitted that the nature by which the standards are communicated to management does not mean that the messages which the law

transmits to management and the adjudicator in separate strands are not distinct. Instead, it merely dictates that the methods by which these standards are expressed to management may on occasion be undertaken by advisers with the better part of caution. A third possible reason for arguing that there is no such distinction is that adjudicators are simply engaged in a process of interpreting the standard which is set down in the particular source of law, whether it be common law or statute. If the adjudicator applies what appears to be a different standard from that which appears to be suggested by the common law or the wording of legislation, this does not necessarily signify the presence of two distinctive standards. Rather, there is a simpler explanation and that is that the process is purely indicative of statutory or legal interpretation in operation. Whilst this is a compelling argument, again, the examples selected from the field of labour law and considered below will demonstrate that something more than the interpretative process is being pursued where it is argued that standards of conduct and standards of review diverge. Indeed, that adjudicators are engaged in something much more profound than a process of construction.

As a means of providing the distinction between standards of conduct and standards of review with greater clarity, it is beneficial to take a real live example from the field of labour law, namely the statutory employment right not to be unfairly dismissed. In determining whether a dismissal is substantively 'unfair', section 98(4) of the Employment Rights Act 1996 instructs employers to act reasonably in treating the employee's misconduct, incapability, lack of qualifications, redundancy, breach of duty or statute, retirement (or some other substantial reason identified by the employer) as a sufficient reason for dismissing the employee. By treating the standard of conduct expected of an employer as one of 'reasonableness' in section 98(4) ERA for the purposes of the

'fairness' of the employer's decision to dismiss,[30] one might well argue that the intention of Parliament was to invite an adjudicator to apply an objective test to the employer's decision to dismiss. As MacCormick has remarked, '[l]awyers, however, have not characterised the 'reasonable' as involving a subjective test… [i]n law what is reasonable is commonly deemed an 'objective' matter..'[31] Such a rationalisation of section 98(4) ERA is advanced by Freer.[32] Thus, adjudicators are guided towards a consideration as to whether the dismissal was a 'bad' decision. However, the judiciary have consistently stated that section 98(4) of the Employment Rights Act 1996 requires an adjudicator to apply the 'range of reasonable responses' test. This formula channels the adjudicator towards a consideration of the band of responses which a reasonable employer might take in the face of the particular actions or omissions of the employee. Importantly, the 'range' test deprives the court or tribunal a free hand to substitute its own judgment for that of the employer or to articulate what ought to have been done by the employer by reference to the standards or mores of society at large. In applying the 'range of reasonable responses' test, the judiciary have articulated a distinction between the standard of conduct which the law expects of the employer (i.e. the standard of conduct to which an employer should conform in the context of dismissal) and the standard of review which the adjudicator must apply to the employer's decision (i.e., the standard according to which the adjudicator must review the employer's decision to dismiss). Thus, there is clear conceptual space between the standard of conduct and the standard of review to be applied by an adjudicator in the case of unfair dismissal, with the latter standard more tolerant of the employer's discretionary power than the former. It is submitted that the rationales for the articulation of such a distinction in the case of unfair

[30] See *W. Devis & Sons Ltd. v Atkins* [1977] A.C. 931, 952 per Viscount Dilhorne.
[31] N. MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, (Oxford, OUP, 2005) 163 and see 177 (writer's annotations in square brackets); See also O. W. Holmes Jr., *The Common Law* (Boston, Mass., Little Brown & Co., 1881) pp. 110-111 and Lord Reid, 'The Law and the Reasonable Man' *Proceedings of the British Academy* 54 (1968) 189-205, p. 201.
[32] A. Freer, "The Range of Reasonable Responses Test – From Guidelines to Statute" (1998) 27 *ILJ* 335, 344.

dismissal are demonstrative of something more symbolic than a process of construction. But, in what way?

In the context of the law of directors' duties in American corporate law, Allen, Jacobs and Strine have argued that divorcing the standard of conduct from the standard of review is inappropriate in a factual context where there is no real difference between decisions that are 'bad' and 'good' decisions which turn out badly.[33] In some circumstances, e.g. where the law has to decide whether a person's action were negligent in tort, it is common that only one decision is 'good' so that decisions which turn out to have harmful effects will usually amount to bad decisions. However, in other contexts, the assessment of a person's decision-making is not so straightforward. Allen, Jacobs and Strine argue that divorcing the standard of conduct from the standard of review, with the latter being set at a more lenient (lenient from the perspective of the employer) level than the former, will be appropriate in a particular context where (i) it is clear that more than one decision may be appropriate in response to a given set of circumstances or (ii) it is difficult for adjudicators to differentiate between 'bad' decisions taken by the employer from 'good' decisions taken by an employer which turn out 'badly'.[34] In circumstances where (i) and (ii) exist, the divergence in the standard of conduct and standard of review is simply a matter of practical fairness to the decision-maker, resulting in a 'zone of protection'.[35]

[33] W T Allen, J E Jacobs, L B Strine JR, "Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and its Progeny as a Standard of Review Problem" (2002) 96 *North Western University Law Review* 449.

[34] W T Allen, J E Jacobs, L B Strine JR, 'Realigning the standard of Review of Director due care with Delaware Public Policy: A Critique of Van Gorkom and its Progeny as a Standard of Review Problem' (2002) 96 *North Western University Law Review* 449, 454-455.

[35] M. A. Eisenberg, "The Divergence of Standards of Conduct and Standards of Review in Corporate Law" (1993) 62 *Fordham Law Review* 437, 444.

To confer greater clarity on the meaning of factor (ii) above, consider the example of an employer who decides to expand its business by opening a new store and employing five employees. The venture is initially successful generating healthy returns, but ultimately six years later, the store is closed with the loss of the five jobs. With the benefit of hindsight, it is tempting for an adjudicator to come to the view that the decision to expand the business was a 'bad' decision, that it was pre-ordained to result in the redundancies of the five employees and that each of the economic dismissals were unfair in terms of section 95 of the ERA. However, such a rationalisation of the position may easily be misguided, since it fails to countenance the possibility that the resolution of the employer to expand may have been a 'good' decision which for faultless reasons simply turned out badly. Here, the 'hindsight bias' phenomenon comes into play. That is to say that when adjudicators evaluate the past decisions of third parties with the knowledge of how things actually turned out, as a matter of behavioural psychology they will inevitably overestimate the likelihood of the actual outcome at the time the decision was made by that third party.[36] The danger is that what was in fact a 'good' decision which turned out badly could be misclassified as a 'bad' decision *ab initio*. For that reason, a finding that the dismissals of the five employees were unfair would be misguided.

Applying the insights of Allen, Jacobs and Strine to the above example of unfair dismissal, it could be argued that in the context of disciplinary proceedings initiated by an employer against an employee for reasons of misconduct, capacity, etc.,[37] it is clear that more than one decision may be reasonable or appropriate. One of the reasonable decisions may be dismissal, another to give the employee a final written warning, another to give the employee a second written warning,

[36] B. Fischhoff, 'For those condemned to study the past: Heuristics and biases in hindsight' and 'Debiasing' in D. Kahneman, P. Slovic and A. Tversky (eds) *Judgment Under Uncertainty: Hueristics and Biases* (Cambridge, CUP, 1982) at pp. 341-343 and 427-431.

[37] In other words, in terms of the reasons in section 98(1) and (2) of the Employment Rights Act 1996.

etc.[38] Thus, in terms of Allen, Jacobs and Strine's approach, on the grounds of being realistic and 'fair' to the decision-maker, the judiciary are justified in affording a margin of discretion to the employer by the adoption of the range of reasonable responses test, which applies a more lenient standard of review than the 'reasonable' standard of conduct. The alternative option of equating the standard of conduct and the standard of review would be too strict and arguably unfair in practical terms on employers since it would presuppose that only one course of conduct is reasonable – which in the case of an employer's decision-making task in the face of misconduct, incapacity, etc. is patently not the case. Thus, rather than being one of pure objectivity, the test applied by the courts and tribunals to the adjudication of the question of unfair dismissal imports some elements of subjectivity into proceedings for reasons of 'practical fairness'.

Another argument put forward by Allen, Jacobs and Strine is that a divergence between the standard of conduct and the standard of review is justified where there is a role for the pursuit of legitimate policy preferences.[39] Therefore, the standard of review to be applied to determine whether an employer should be found liable ought to be reflective of substantive policy considerations. Are there strong arguments for policy preferences to be given particular weight in the context of an employer's decision to dismiss, which justify the application of a more deferential standard of review? In the context of dismissal, Collins has identified an implicit policy choice in favour of an approach towards limited judicial interference in the managerial prerogative to dismiss its employees. That is to say that the policy preference is to legitimise the restriction of judicial intervention to circumstances where the actions of an employee have not resulted in harm

[38] That much is acknowledged by Ackner LJ in *British Leyland UK Ltd. v Swift* [1981] IRLR 91, 93.
[39] W T Allen, J E Jacobs, L B Strine JR, "Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law" (2001) 26 *Delaware Journal of Corporate Law* 859, 868-869.

to the employer's legitimate commercial interests.[40] In cases where the commercial interests of employers are affected by the conduct, capacity, etc. of an employee, such a policy choice endorses the construction of a standard of review such as the range test which affords a wider remit of discretion to the employer to regulate liability for the purposes of the 'substantive' fairness of the decision to dismiss.

Moreover, Eisenberg argues for bounded rationality as a rationale for divergence.[41] Here, the underlying notion applicable is that there is a differential in knowledge of the import of the relevant legal provisions between an employer and an adjudicator. Whilst an adjudicator will be instructed by counsel in the detailed aspects of employment law (or will be aware of the body of employment law as an experienced and qualified lawyer), an employer will labour under limited knowledge and will invariably decide how to act on the basis of incomplete information. Moreover, as a normative proposition, employers should not be expected to understand all of employment law or consult legal practitioners before making decisions: the costs associated with such endeavours would be prohibitive to the employer. In such circumstances, Eisenberg argues that 'the legal messages which are primarily directed to [employers]- that is, standards of conduct- should be simple, so that they can be effectively communicated'.[42] Thus, the argument from simplicity/complexity provides explanatory force for a distinction between the intensity attached to the standard of conduct and standard of review.

[40] H. Collins, *Justice in Dismissal* (Oxford, Clarendon Press, 1992) at pp. 97-102.
[41] M. A. Eisenberg, "The Divergence of Standards of Conduct and Standards of Review in Corporate Law" (1993) 62 *Fordham Law Review* 437, 466.
[42] M. A. Eisenberg, "The Divergence of Standards of Conduct and Standards of Review in Corporate Law" (1993) 62 *Fordham Law Review* 437, 466.

Whilst it is useful to consider the circumstances in which a departure of the standard of review from the standard of conduct is justified, it is also worthwhile to pause for a moment to ask what the value in the conceptual distinction between the two standards is in more general terms. Here, it is submitted that at a conceptual level, the courts are engaged in something more than a simple process of interpretation. Instead, implicit in the recognition of the distinction is the realisation that employers and adjudicators possess differing levels of knowledge about the employer's general managerial behaviour, including the circumstances surrounding and influencing any managerial decision which an adjudicator may be required to evaluate. It is more often than not the case that there will be a knowledge deficit on the part of the adjudicator regarding the commercial environment of the employer. Thus the adjudicator will labour under an informational deficit in the sense that they are privy to imperfect information. In such circumstances, the distinction between the standard of conduct and the standard of review possesses practical force since there is merit in the law prescribing differing intensities of scrutiny to both standards lest the law wish to subject itself to the charge that it lacks legitimacy. Moreover, the importance of the distinction between the two standards lies in its correlation to the conception of law as an instrument which possesses symbolical value in its own right, in the sense that the law is more than simply a coercive tool and functions to communicate authoritative moral guidance about the manner in which employers ought to behave and exercise the managerial prerogative. In that sense, the law articulates the expectations which it has of the employer via the standard of conduct and the message which the law sends to the employer is morally and politically charged. Of course, there may well be dissonance between that message and the message which is communicated to the adjudicator via the standard of review, which itself contains a moral component. But the utility in the distinction between the two standards in that scenario lies not so much in the way that it coerces or enjoins the employer and adjudicator to comply with the

standard than in the symbolic value attached to the different messages which are sent to the recipients. Furthermore, on a more practical level, there may also be commercial value in the distinction between a standard of conduct and standard of review where the former is set at a more exacting level of intensity of scrutiny than the latter. For example, there may be market-oriented incentives and benefits for the employer who conducts its affairs on the basis of the higher standard of conduct in terms of contented staff, increased productivity, reputational benefits in the market and various accreditations by industry and outside bodies.

Moreover, beyond the isolated example of the criteria of 'substantive fairness' in section 98(4) of the Employment Rights Act 1996, the insights afforded by the 'practical fairness' and 'policy' perspectives identified above as justifications for the erection of differing standards of conduct and standards of review represent useful instruments of analysis in the context of employment rights articulated as standards in the field of labour law generally. For example, consider the situation where calls are being made for the reform of a particularly lax standard of review on the basis that the standards of review applied in the context of a series of other employment rights attract a greater intensity of scrutiny. Rather than invoking the comparative strength of other standards of review as a rationale for reform, it is submitted that the consideration and evaluation of the 'practical fairness' and policy constructs identified by Allen, Jacobs and Strine are particularly useful criteria. Their application in the case of the particular employment right under attack can function to supply justificatory foundations for a relevant package of reform which are much more conceptually forceful than rationales based on casual formalistic observations that since a lax standard of review exists in such contexts, labour law inevitably suffers from condemnable incoherence and that something ought to be done by way of reform. By focusing on the nature of the decision taken by the employer (which will obviously be conditioned by the

relevant employment right under examination), whether it is clear that more than one decision may be appropriate taking into account the underlying facts surrounding that decision and the policy issues informing and underpinning such decisions, lawmakers or law reformers can come to a more informed and balanced view as to the manner in which adjudicators should approach the task of review. If more than one decision may be appropriate in a given set of circumstances, then on fairness grounds, absent any consideration of policy factors, articulating a standard of review based on a lower degree of scrutiny than the standard of conduct may be warranted. Moreover, where there are good policy reasons for selecting a standard of review which is more deferential to management than the standard of conduct,[43] again this may be a valid choice. However, where the 'fairness' criteria or policy considerations militate against each other, the strength of each will be important in fashioning the standard of review. For example, although policy factors may suggest a more lenient standard of review, nevertheless it may be that the weight of the justifications in terms of the fairness criteria operate as a sufficient counter-balance for the rejection of such an indulgent standard of review. In this way, one can seek to extract the defining conditions and criteria for standards of adjudicatory review which in the circumstances may validly suggest criteria which are less or more lenient towards the evaluation of an employer's conduct or decision-making than the standard of conduct, depending on the nature of the decision to be taken by the employer and the relevant policy issues.

An alternative argument put forward by MacCormick is that the identity and nature of the fundamental values, interests and purposes which underlie an employment right will influence the judgment of the adjudicator in the task of applying the standard of review to a particular case.

[43] For example, that the standard of review should be pitched at a point which is reflective of the policy choice of restricting judicial intervention to circumstances where the actions of the employee have not caused harm to the employer's commercial operation.

That is to say that in determining whether the applicable standard of review has been discharged, an adjudicator will engage in the impartial balancing and assigning of relative importance to intrinsic values, interests, etc., which will exercise significant clout over the issue of liability.[44] Whilst such an argument undoubtedly possesses considerable force in a context where the standard of conduct and standard of review (i) are conflated or (ii) the 'practical fairness' and 'policy' factors discussed by Allen, Jacobs and Strine apply to elicit a higher degree of managerial scrutiny for the standard of review (in comparison with the standard of conduct), it is submitted that such a proposition is of limited application in circumstances where the standard of review is set at a more forgiving level than the standard of conduct. In the latter case, there is considerable merit in the argument that the strength of the combination of the relevant 'practical fairness' and 'policy' factors which have forged the contours of the standard of review in the context of an employment right will function to outweigh any countervailing impulses of an adjudicator predicated on the relative importance of the underlying values, interests, etc., which underpin the employment right. As will be argued below, rather than functioning to determine the outcome of the application of the standard of review to a set of facts in a particular case *ex post*, it is submitted that the relative strength of the fundamental values and interests which underpin an employment right will operate to fashion the intensity attached to the standard of conduct *ex ante*. Having been taken into account *ex ante* to fix the level of intensity of the standard of conduct, fundamental values and interests ought not also to be applied as a means of resolving cases on the basis of a more lenient standard of review *ex post*. Otherwise, the process would be open to the charge that it lacked legitimacy on the basis of unwarranted 'double-counting'.

[44] N. MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, (Oxford, OUP, 2005) 168.

4. Standards of Conduct

In the previous section, an exploration was made of how Allen, Jacobs and Strine invoked (i) 'practical fairness' and (ii) policy factors in instrumental terms as a means of justifying the erection of a barrier between standards of conduct and standards of review. In fixing the standard of review, Allen, Jacobs and Strine also advocated the approach whereby (i) and (ii) are utilised as useful instruments of analysis. Such factors (i) and (ii) can be utilised in three ways. First, to construct a more deferential standard of review for adjudicators to apply in comparison with the standard of conduct directed at employers. Alternatively, the same factors can be evaluated as a means of forging a more stringent standard of review than the standard of conduct. Finally, a consideration of factors (i) and (ii) may result in a recognition that the standard of conduct and standard of review should be conflated in one and the same standard – in such a case, the issues revealed by the (i) 'practical fairness' and (ii) 'policy' considerations would be insufficiently compelling to justify a rupture between the standard of conduct and review. Hence, such factors (i) and (ii) are of evident utility in resolving the parameters and content of the standard of review. However, this presupposes that it is possible to identify an appropriate means of selecting the most suitable standard of conduct in the context of a particular employment right. How does one approach the task of fixing the proper parameters of the standard of conduct?

In answering this question, the academic literature considered above in respect of the justifications for selecting mandatory status over default status (for a rule) generates certain useful pointers. To recap, there are economic and jurisprudential rationales which might lead law-makers to design immutable rules. Economic rationales in the sense of efficiency factors associated with inderogable rules and jurisprudential rationales where important policy goals or

fundamental values are at stake. Likewise, in terms of the functionalist philosophy which seeks to illuminate labour law through its extrinsic purposes and goals, there is considerable force in the argument that the more fundamental the values or policy considerations informing the substance of an employment right, the more stringent (in the sense of the intensity of scrutiny) the standard allocated to an employment right should be. In that sense, the level of scrutiny exerted upon managerial behaviour would intensify proportionally to the criticality of the right in terms of principle or policy. This proposition is predicated on the notion of subsidiarity. That is to say that decisions lying at the interface of an employee and the engagement of an employment right ought to be taken by persons located most closely to that decision. In the context of employment rights, that person will be the employer. However, the concept of subsidiarity dictates that it will not always be the employer who is the most appropriate person to adjudicate insofar as it recognises the scope for self-interest to cloud the judgment of the employer decision-maker. In such circumstances, the responsibility for reviewing the decision will be devolved to an impartial adjudicator and the more fundamental the values or policy interests underpinning the employment right, the greater the intensity of the standard of review (applied by the impartial adjudicator over the decision-maker) ought to be.

Thus, if one were entrusted with the task of designing a system of labour law afresh, there is force in the proposition that one ought to benchmark the intensity of the standard of conduct against the desirability of achieving certain fundamental values or policy objectives. Standards of conduct would be re-conceptualised and re-calibrated so that they were reflective of fundamental conceptions and values which currently underpin employment relations, such as dignity, respect, co-operation, partnership, inclusion and competitiveness. Although such an endeavour is open to the accusation that it is particularly vague and lacking in specification, the force of such a

sentiment should not be taken to be so compelling that its abandonment is justified. Indeed, a number of jurists in recent times have sought to benchmark a whole series of employment rights (to which such standards attach) against the aforementioned fundamental conceptions.[45] With some justification, one might argue that what can be done for employment rights can equally be achieved for the standards which are accessory to such rights.

Whilst such an approach is attractive, there are particular difficulties which must be overcome. First, one of the drawbacks of applying such a functionalist perspective is that a bird's eye structuralist overview is perhaps overlooked. In other words, if the standards of conduct associated with different employment rights vary in levels of intensity, from the formalistic viewpoint of labour law as an autonomous body of law (to which those rights analysed functionally duly belong), issues of internal coherence are somewhat elided. In other words, in diverse contexts, and sometimes in the same context, employers can be expected to meet diverse standards which vary in the degree of scrutiny of managerial action. This is a fundamental point to which the writer will turn in greater detail in a future article. A more obvious difficulty is that any normative framework which seeks to fix a standard of conduct on this basis must itself first establish a wholly separate framework regarding a hierarchy of employment rights in terms of some being more fundamental than others – and this would be gauged with reference to the level of criticality of the underpinning values and policy objectives.[46] The difficulty with such an endeavour is that it is an inherently subjective pursuit which is value-laden in nature. Hence, an alternative way of approaching the normative significance of standards is to turn matters on their

[45] H. Collins, *Employment Law* (Oxford, OUP, Clarendon, 2003), chapters 1 – 7; D. Brodie, "Legal Coherence and the Employment Revolution" (2001) 117 *LQR* 604, 620-621; H. Collins, 'Regulating the Employment Relationship for Competitiveness' (2001) 30 *ILJ* 17.

[46] A Herculean task which Robert Alexy has tackled in his magisterial work, *A Theory of Constitutional Rights*, (Oxford, OUP, 2002).

head and to argue that the intensity of review which is attached to a right tells us something about how fundamental the law considers the values underpinning that particular right to be. To articulate this point in another way, if one were to chart the standards of conduct attached to employment rights presently existing in the field of labour law, there would be some correlation between the extent of the deference to the employer associated with the selected standard and the significance with which the law would appear to treat the right and the latent values which influence its content and scope of application. For example, if the standard of conduct expected of the employer is to act rationally and in good faith in the case of an employee's right to a discretionary bonus, but the standard to be expected of the employer is the more stringent one of objectively determined reasonableness in the case of the disabled employee's right of reasonable accommodation, one could argue that the law conceives the latter employment right to be more fundamental than the former since the intensity of scrutiny associated with an objective test is much higher than that of rationality. In terms of such a framework, one can begin to understand the level of importance which a system of labour law attaches to particular employment rights. Pursuing this point a little further, it also means that a selected number of employment rights can be scrutinised with a hierarchy of intensity of standards of conduct identified in terms of those rights, which in turn, enables the significance or relative strength of such employment rights to be charted against a spectrum ranging from 'extremely significant' to 'not significant'.

Of course, one might oppose such a line of argument on the basis of the contestation that other factors serve to influence the intensity of the standard of conduct, such as transaction costs and political compromise, As such, the argument would run that the directness of the connection between the intensity of scrutiny and the significance of the employment rights is tenuous at best. However, it is submitted that such an objection can be addressed on two fronts. First, whilst it is

recognised that political compromise is indeed an influencing feature, transaction costs analyses are more useful when one is required to decide *the form* which an employment right ought to take, that is to say, whether it is articulated as a rule or a standard. In such a case, it is clear that a cost-benefit analysis is a useful instrument. However, in the case of the level of intensity of scrutiny attached to a standard of conduct, it is perhaps not so useful, since the concern is more about the moral message which is communicated to the employer being duly reflective of the symbolical force attached to the law in that context. Moreover, a cost-benefit evaluation does not translate particularly elegantly to the task of selection of the intensity of scrutiny since it is not wholly clear what the savings or benefits would be in the event that a particularly high intensity were chosen. Secondly, and more importantly, the argument is not that there is a direct connection between the significance of the employment right and the intensity of scrutiny. Instead, it is contended that the connection is slightly looser in the sense that it represents a broad-brush correlation. Such a contention recognises that other factors do indeed operate to fix the level of intensity, whilst preserving the fundamental importance of that correlation intact.

It is worthwhile to take an existing example from the field of labour law to underscore the point being made in this section. The 'duty to make reasonable adjustments'[47] which is encountered in the field of disability discrimination law is quite revealing. In terms of section 4A(1) of the DDA, in discharging its obligation to make adjustments to the physical aspects of premises or provisions, criteria and practices, the duty of the employer is to take such steps as are reasonable, in all the circumstances of the case. In determining what is 'reasonable', it is submitted that there are three possible formulations of the standard of conduct which is directed at the employer. First, what is reasonable may be judged according to a subjective standard of conduct which is particularly

[47] Sections 3A(2), 4A(1) and 18B of the Disability Discrimination Act 1995 ("DDA")

lenient. According to such a prescription, the employer would be deemed to have discharged its duty to make reasonable adjustments if the employer itself had a genuine belief (i) that its conduct was reasonable or lawful, (ii) that it had complied with the duty or (iii) that the reason for its conduct was reasonable or lawful. An alternative would be to apply the 'range of reasonable responses' standard. In terms of such a formulation, the employer would be deemed to have failed to discharge its duty to make reasonable adjustments if the court or tribunal had identified a band or range of responses which a reasonable employer would have taken and the decisions or actions taken, or sanctions adopted, by the employer did not feature on the list of reasonable responses identified by the court or tribunal. Whilst not as lenient as the first subjective standard of reasonableness, the range of reasonable responses standard is indeed a forgiving standard with which to conform. However, it is the third possibility which has been adopted by the judiciary as the applicable standard. This is amply demonstrated by *Collins v Royal National Theatre Board Ltd*.[48] and the judgment of Kay LJ in *Smith v Churchills Stairlifts plc*.[49] Here it was ruled that the appropriate standard of conduct was objective in nature. An objective standard enjoins a more intrusive degree of intervention than the other two possibilities. In terms of such a standard, what the employer thought or what a range of differing reasonable employers might have decided or done is irrelevant. Instead, an adjudicator is empowered to substitute its own judgment for that of the employer by reference to a hypothetical reasonable employer.

As we have demonstrated, the objective standard associated with the duty to make reasonable adjustments is the most stringent of the three canvassed possibilities. This tells us a significant amount about the level of importance of the employment right. It also fits with our understanding of the philosophy behind the duty to make reasonable adjustments in the DDA. The inherent value

[48] [2004] IRLR 395.
[49] [2006] IRLR 41.

underpinning the duty to make reasonable adjustments is the encouragement of positive discrimination in favour of disabled employees. In *Archibald v Fife Council*, Baroness Hale recognised:

> It is common ground that the [DDA] entails a measure of positive discrimination, in the sense that employers are required to take steps to help disabled people which they are not required to take for others. It is also common ground that employers are only required to take those steps which in all the circumstances it is reasonable for them to have to take.[50]

Although the above passage from the speech of Baroness Hale refers to the 'DDA', it is clear from a later section of her speech that she was confining the wider proposition in the above excerpt to the 'duty to make reasonable adjustments' in sections 3A(2) and 4A(1) of the DDA.

It is submitted that the analysis in this section is instructive in instrumental terms. However, one must seek to build a framework which supports the notion of varying intensities of review. It is only once standards of conduct can be compared that the level of significance of differing standards (and thus employment rights) can be identified. This 'benchmarking' issue will now be explored in greater detail in the following section.

[50] *Archibald v Fife Council* [2004] ICR 954, 969 at para. [57].

5. A Normative Framework for Standards of Conduct

Any assertion that conceptual space may possibly exist between standards of conduct and standards of review presupposes that standards themselves may vary in intensity. Moreover, the level of scrutiny of managerial action attached to the standard of conduct enables us to understand the degree of importance which the law allocates to a particular employment right, including the inherent values and policy issues. With this in mind, one ought to take tentative steps towards constructing a normative framework by which such an hypothesis can be given greater clarity and strength. This can be achieved by building a picture of alternative continuums or spectra of standards against which intensities of review can be charted.

In pursuing this line of thought, from a normative perspective, it is submitted that there are two methods of providing substance to the idea of the degree of intensity of a standard. First, one might chart the degree of scrutiny captured by a particular standard against a spectrum ranging from subjectivity to objectivity ("the subjective/objective spectrum").[51] Secondly, an alternative range which might be adopted is the degree to which the standard exacts a lesser or greater degree of scrutiny of managerial action and decision-making ("the scrutiny spectrum"). In the case of the first possibility, the range begins at one end with the anticipation of a more marginal role for an adjudicator based on a review confined to whether the employer had a genuine belief (i) that its conduct was reasonable or lawful, (ii) that it had complied with a particular duty or (iii) that the reason for its conduct was reasonable or lawful. Meanwhile, the other end of the scale provides that the adjudicator is entitled to apply an objective test, to the effect that regard can be had to outside factors, practices and values of society at large as a means of intervening liberally.

[51] N. MacCormick, *Rhetoric and the Rule of Law* (Oxford, OUP, 2005) 162-170.

A subjective approach is simpler for an employer to discharge, whereas an objective test makes it more likely that an employer will be held liable. Thus, if one were to plot subjectivity and objectivity on a scale of 0 to 1, where '0' represents no review of an employer's actions or decisions and '1' represents the fullest possible review, a subjective approach would rest closer to '0' than the figure allocated to the objective test and the objective test would fall closer to '1' than the value attributed to the subjective approach.

Meanwhile, in the case of the second possible range (i.e. the scrutiny spectrum), the distinction between subjective and objective approaches is elided. Instead, it is a cruder technique and concentration is focused on the intensity of review attached to the standard itself, which is evaluated in terms of the degree to which managerial action is called to account, i.e. from 'weak' to 'strong'. If '0' is representative of no review of the employer's conduct and '1' is equivalent to a full review, a higher intensity of review would veer towards the '1' descriptor than the '0' one. For example, a rationality standard, which posits that liability will only fall upon an employer where no rational employer would have made the decision taken, is not overtly couched in terms of subjective or objective language. However, it is clear that a rationality standard is not as intrusive from the viewpoint of the employer than a proportionality standard. In such circumstances, we can conclude that rationality entails a more limited form of policing of the decisions and actions of employers and is thus closer to '0' than '1' on the scale than a proportionality standard.

Equipped with these two alternative spectra against which standards may be plotted, it is possible to evaluate employment rights. In terms of the hypothesis advanced above, where the policy factors or fundamental values associated with an employment right are deemed to be extremely important, one would expect to see the intensity of review attached to the standard of conduct

inclined more towards the objective end than the subjective end of the subjective/objective spectrum. Likewise, in the case of the scrutiny spectrum, the standard would be plotted closer to '1' than '0' as the intensity of review increased. In such a way, employment rights expressed as standards can be benchmarked against the factors which influenced the manner in which they were articulated. It is submitted that such a normative framework accords with a functionalist perspective of employment rights and labour law generally: in other words, that labour law rights ought to be understood through, and influenced by, the objectives which they are designed to serve.

6. Conclusion

This paper proceeds from the viewpoint that employment rights can be divided into legal commands communicated as (i) rules and (ii) standards. Where standards are concerned, another division may be made between standards of conduct and standards of review. In the labour law discipline, standards of conduct are directed at employers and standards of review are duly addressed at adjudicators. Applying a functionalist normative perspective, the intensity of the standard of conduct addressed to an employer ought to be fixed at a level which is commensurate to the importance of the policy factors and fundamental values which underpin it. Turning this normative proposition on its head, this means that there is some correlation between the significance of an employment right expressed as a standard and the degree of intensity of review attached to the standard of conduct. Such a formulation enables a researcher to examine differing employment rights and build up a hierarchy of standards, which in turn, enables the significance or relative strength of those employment rights to be charted against a spectrum ranging from 'extremely significant' to 'not significant'. To enable such a 'benchmarking' process to be

conducted, this paper has sought to establish possible normative frameworks which give content to the notion of varying intensities of review by proposing two alternative spectra, namely (i) the subjective/objective spectrum which plots intensity against subjective and objective assessments and (ii) the simpler scrutiny spectrum, which charts the strength of review in more general terms from 'weak' to 'strong'. However, all of this is somewhat tempered by the fact that the intensity of the standards of conduct may diverge from the standard of review on grounds of 'practical fairness' or 'policy' preferences. In such circumstances, the standard of review may be fixed at a more forgiving degree of intensity than the standard of conduct to reflect the countervailing factors identified by the application of such 'practical fairness' or 'policy' grounds. This analysis and hypothesis represents an attempt to identify the guidance which is furnished by the 'metalaw', i.e. the tacit rules which underpin, guide and inform how rules, standards, standards of conduct and standards of review are applied by the judiciary in a manner which is not dissimilar to the rules in the Interpretation Act 1978. However, in the field of labour law, this process is pursued not only by statute but also by the judiciary which possesses the added virtue that it is less prone to becoming frozen, inflexible or hard.

Whilst such an approach is particularly attractive from a functionalist viewpoint, it is open to various objections to which certain allusions have been made at various points in this paper. From a formalistic perspective, i.e., a philosophy which places great value on the internal intelligibility and coherence of a system of rules, principles and standards in an autonomous area of law such as labour law, conceivably, there could be difficulties caused by standards of review which are attached to differing employment rights being pitched at differing levels of intensity. On formalistic grounds, the presence of differing standards of review for different employment rights can be attacked on the basis that labour law lacks coherence and is internally contradictory as an

independent discipline. The point here becomes particularly acute where one conducts a descriptive examination of the law governing the regulation of the employment relationship as it currently stands. It soon becomes clear that there are a number of standards or approaches to the review of the exercise of the managerial prerogative. The intensity of these standards of review can be classified within a hierarchy with each set exerting greater or lesser control over the employer's freedom of autonomy in terms of either of the normative frameworks established in this paper, namely the (i) the subjective/objective spectrum and (ii) the scrutiny spectrum. It is submitted that future research can reveal the extent of those difficulties, which it is submitted, expose a number of anomalies which provides a degree of force to the formalistic objections.